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July 27, 1993

Mr. Ruben E. Castillo
Senior Deputy County Counsel
P. O. Box 1549
Fresno, CA 93716

Dear Mr. Castillo:

Please excuse our delay in responding to your letters to me of March 24, and May 24, 1993. Other matters requiring our attention have made such delay unavoidable.

Your letters request our opinion as to whether a taxable possessory interest was created as a result of one or more management consultant agreements between the Table Mountain Band of Indians of the Table Mountain Rancheria (Tribe) and American Enterprises (American).

It is your view and that of the assessor that American has a taxable possessory as a result of its operation of a bingo enterprise on Indian land. You refer to our letters of May 7, 1987 and March 14, 1985 regarding the existence of possessory interests on Indian lands as being dispositive of the issue.

Property Tax Rule 21 (a) provides in pertinent part that a possessory may exist as the result of:

(1) A grant of a leasehold estate, an easement, a profit a prendre, or any other legal or equitable interest of less than freehold, regardless of how the interest is identified in the document by which it was created, provided the grant confers a right of possession or exclusive use which is independent, durable, and exclusive of rights held by others in the property;

(2) Actual possession by one intending to use the property to the exclusion of any other interfering use,

56

irrespective of any semblance of actual title or right.
(Emphasis added.)

It is clear from reading both of the letters you refer to that the contractor-managers there involved had the right to operate the bingo enterprises in question and thus were necessarily using Indian land and improvements.

For example, on page 4 of the May 7, 1987 letter, the stated purpose of the contract is said to be "to employ Manager to resume and continue operation of the Band's Bingo Enterprise." The remaining provisions of the contract addressed in that letter were consistent with that stated purpose. There was little doubt, therefore, that Manager had a right of possession or exclusive use of the Indian land in that case.

Similarly, the contract addressed in the March 14, 1985 letter provided (as indicated on page 4 of the letter) that "Owner hereby retains and engages contractor-manager...to act solely and exclusively...to construct, improve, develop, manage, operate and maintain the property...as a facility for the conduct of bingo."

Neither the 1991 nor the 1992 agreements between the Tribe and American by their terms give American the right to operate the Tribe's Gaming Enterprise (Enterprise) or to possess or use the Tribe's real property.

The purpose of each agreement is stated to be to retain American as a management consultant and for American to advise and assist the Tribe in games management. (Par. I of each agreement.)

Each agreement provides for a Joint Management Committee (JMC) consisting of two representatives of American and three representatives of the Tribe. The JMC is required to select a General Manager (GM) to manage the Enterprise but neither agreement requires American's selection as GM. In fact, the 1992 agreement states that "American does not exercise management control over Enterprise operations." (Par. III. A. 1.) The agreements do require, however, that a member of the Tribe be selected as Assistant General Manager. As indicated above, nothing in either agreement expressly gives American any right to the use or possession of the subject real property.

Your letters, however, indicate that American is the operator of the Tribe's bingo enterprise on Indian lands. Therefore, we will assume that, for purposes of this opinion,

American was selected by the JMC as the GM or is, in fact, managing the Enterprise as GM.

Under both agreements, the GM has the initial responsibility and authority for the day-to-day management of Enterprise operations subject to the approval of the JMC. American, as GM, would, therefore, necessarily have a physical presence on the Enterprise real property and arguably have possession and/or use of such real property. In any event, it is necessary to confirm or verify by physical inspection the extent to which, if at all, American actually possesses or uses the premises. Without any use or possession or right thereto, American has no taxable possessory interest.

As you know, the courts have held that in order to find the existence of a taxable possessory interest, it must be shown that the right of possession or use is sufficiently independent, durable and exclusive, and must confer a private benefit. See e.g., Cox Cable San Diego, Inc. v. County of San Diego (1986) 185 Cal.App.3d 368, 377.

In determining the existence of a taxable possessory interest under a written instrument, an objective standard rather than the literal language of the written instrument controls in ascertaining the nature of the relationship established. Because of the variety of interests that may be created by written instruments, the question of whether a taxable possessory interest has been created must be decided on a case-by-case basis by weighing the factors of durability, exclusiveness, private benefit and independence. In each case, judgment is to be made by an examination of the writing in its entirety. (Stadium Concessions, Inc. v. City of Los Angeles (1976) 60 Cal.App.3d 215; Wells National Services Corp. v. County of Santa Clara (1976) 54 Cal.App.3d 579; Mattson v. County of Contra Costa (1968) 258 Cal.App.2d 205.) In order to determine whether a taxable possessory interest has been created by the agreements in this case, it is necessary to analyze the agreements in light of the standard set forth above.

Durability

To satisfy the requirement of durability, the agreement must confer use for a determinable period and the use has to be reasonably certain to last for that period. (Kaiser v. Reed (1947) 30 Cal.2d 160.)

More recently the Court of Appeal has stated that "the protax trend has found courts testing the requirement of a reasonably certain period of enjoyment by an examination of the

agreement as stated in writing and the history of the relationship of the parties, thereby finding durability because of the passage of time even though the agreement may have been cancelable at the will of the parties." Freeman v. County of Fresno (1981) 126 Cal.App.3d 459, 463.)

Paragraph II.A. of the 1991 agreement provides for a term of five years with an option to renew for an additional two years upon mutual agreement of the parties. The second agreement was executed in November 1992 and replaced the earlier agreement. It provides for a term of seven years.

Although Paragraph VI of the 1992 agreement permits either party to terminate the agreement for cause, this fact does not detract from the factor of durability. The courts have held that even the right to terminate possession at the will of the government did not preclude the existence of a taxable possessory interest. See e.g., Board of Supervisors v. Archer (1971) 18 Cal.App.3d 717; United States of America v. County of Fresno (1975) 50 Cal.App.3d 633.)

Here, a contractual relationship between American and the Tribe has existed for at least two years and seems reasonably certain to continue for the remainder of the existing term of the agreement. Such a period is of more than sufficient duration to satisfy the factor of durability. (Mattson v. County of Contra Costa, supra, 258 Cal.App.2d at p. 211.)

Private Benefit

The requirement of private benefit is met if there is an opportunity for the holder of the interest to make a profit. (Wells Nat. Services Corp. v. County of Santa Clara, supra, 54 Cal.App.3d at p. 585.)

Paragraph III.B. of each agreement provides for compensation to American in consideration for the performance of its contractual duties (as a management consultant) a percentage of the net profits of the Enterprise. The percentage ranges from 40 percent in the first agreement to 35 percent during the first five years of the second agreement to 30 percent thereafter. If this compensation can be factually related to American's possession or use of the real property, the factor of private benefit would be satisfied. It would be helpful to know whether American is receiving any additional payment to serve as GM.

Exclusiveness

The test for exclusiveness is not exclusive possession against all the world including the owner. (Wells Nat. Service Corp. v. County of Santa Clara; *supra*, 54 Cal.App.3d at p. 584.) The right of use, however, must carry with it the degree of exclusiveness necessary to give the user something more than a right in common with others. (United States of America v. County of Fresno, *supra*, 50 Cal.App.3d at p. 658.)

To be exclusive, such use "must not be one shared by the general public and, at least until canceled, must be enforceable against the public entity which permits the use." (Freeman v. County of Fresno, *supra*, 126 Cal.App.3d at pp. 463, 464; see also Property Tax Rule 21(e).)

As stated by the Court of Appeal in County of Los Angeles v. County of Los Angeles Assessment Appeals Board (1993) 13 Cal.App.4th 102, 111:

"The consistent trend of decisions has been to favor assessors' claims, by holding that possessory interests may arise from limited or concurrent exclusive uses, so long as they involve a grant of rights not shared by the general public. (Citation omitted.) But none of these holdings impairs or retreats from the basic principle that, just as possessory interests are a species of taxable property, the possession or use which grounds them means and requires not just some benefit from the public property, but physical possession or use of it."

Since we have assumed above that American is functioning as GM of the Enterprise, its possession and/or use of the real property in its day-to-day management of Enterprise operations would necessarily be sufficient to satisfy the factor of exclusiveness under the foregoing standards.

Independence

To qualify as a possessory interest, the right to use property must be sufficiently exclusive, durable and independent of the public owner to constitute more than an agency. (Pacific Grove-Asilomar Operating Corp. v. County of Monterey (1974) 43 Cal.App.3d 675, 684.) "If, in practical effect, one of the parties has the right to exercise complete control over the operation, an agency relationship exists;..." (Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d 610, 613.)

In the Pacific Grove case, the court found that an agency was created by the agreement there in question. That decision is the only possessory interest case we are aware of in which an appellate court has concluded that an agency relationship existed.

The court concluded that Asilomar's management of the property was not independent, but subject to state control in every way. The court noted, however, that "the fact that the relationship between Asilomar and the state has no profit motive is an element material in determining the nature of Asilomar's interest." (Asilomar was a nonprofit corporation organized and established solely to manage the state-owned conference grounds in question and derived no private benefit from its management of the property.) The court also noted that Asilomar did not have exclusive use of the property since the property was open to the general public. In the commercial setting involved in Mattson, however, such public access (to the dining area of a public golf course operation) was held not to detract from the element of exclusiveness of possession. (Mattson v. County of Contra Costa, *supra*, 258 Cal.App.2d at p. 210.)

Here, the JMC, which acts by majority vote, is controlled by the Tribe which has three members compared to American which has two. The JMC exerts various controls regarding the management of the Enterprise pursuant to Paragraph IV of each agreement. For example, the JCM (1) must formulate or approve all Enterprise decisions, policies, and procedures; (2) must select and supervise a GM which serves at its pleasure; (3) makes decisions on capital improvements or other capital expenditures; (4) must hear and resolve all employee grievances; (5) must ensure that compensation and expenses of all personnel employed shall be commercially reasonable; (6) must ensure that all personnel having regular or unrestricted access to Enterprise cash and/or books shall be bonded; (7) must ensure that no excess cash is kept on the premises of the Enterprise; (8) must select the financial institutions for the deposit of Enterprise funds; (9) must establish two operating accounts, one general and one payroll; (10) must establish interest bearing accounts and deposit excess cash therein; and (11) must select accountants for accounting and annual audits of the books at the expense of the Enterprise.

With respect to American, Paragraph IV of each agreement provides that the GM shall be vested with initial responsibility and authority for the day-to-day operations of the Enterprise subject to approval of the JMC and shall have the authority and duty to implement the JMC's policies and procedures.

Further, Paragraph IV B. of each agreement provides that American shall provide training in all aspects of gaming to selected Tribal members and other key employees; shall advance necessary extraordinary costs to expand the facility; purchase gaming equipment and provide working capital subject to the approval of the JMC; shall provide proposed comprehensive written internal control policies and procedures to the JMC for its review and approval and provide ongoing technical assistance in the revision and implementation of such procedures; and shall prepare annually proposed Enterprise operating budgets for review and approval of the JMC.

Also, subject to approval of the JMC, American shall arrange for the services of a security force to assure the safety of the Enterprise customers, personnel and property; shall provide marketing plans for the Enterprise; formulate gaming programs; conduct surveys in the community; propose specific games; and keep the JMC informed of all Class II and Class III gaming developments.

The 1992 agreement (Par. IV. A. 6.) characterizes the GM as an employee of the Enterprise and requires the GM to act in that capacity as an agent of the Enterprise and Tribe but not American. That agreement also describes American as the Tribe's agent for all acts undertaken in performance of its obligations as management consultant (Par. XIV and IV B. 1.) Paragraph XIII of the 1992 agreement further states that the agreement is not a lease and does not convey any interest in the land or improvements on which the Bingo Enterprise is located.

As explained above and in our letters of March 14, 1985 and May 7, 1987, the courts have held that such literal descriptions and language are not controlling. Instead, an objective standard rather than the literal language of the written instrument controls in ascertaining the nature of the relationship established. As indicated, this requires an examination of the instrument in its entirety.

With respect to the factor of independence, it is true that the powers of the JMC are numerous. Many of such powers, however, relate to relatively insignificant matters or to protecting the Tribe's financial interests. The reality, however, seems to be (assuming again that American is functioning as GM) that American is really operating the Enterprise through its day-to-day management of Enterprise operations and provision of financial, management and gaming expertise. Although such management and other actions by American are subject to the control of the JMC, a similar arrangement was held not to preclude independent operation in Mattson v. County of Santa

July 27, 1993

Clara, supra, 258 Cal.App.2d, at pp. 211, 212. It is true that the JMC is controlled by the Tribe, and can disapprove of many proposals and actions of American, however, it seems likely, as a practical matter, that because of American's financial resources and management, gaming and financial expertise (which the Tribe admits American has and it lacks), disapproval by the JMC would seldom occur unless with respect to an action or policy which was clearly detrimental to the Tribe. We, therefore, believe that American is sufficiently autonomous so as not to be considered an agent of the Tribe and that the factor of independence is satisfied. For the foregoing reasons and since American is a for-profit corporation and is to receive a substantial portion of the net profits each year, this case is clearly distinguishable from the Pacific Grove case.

Moreover, even if American's independence were questionable here, there is authority to the effect that in a profit seeking operation independence from public control is not a key to taxability. (Freeman v. County of Fresno, supra, 126 Cal.App.3d at p. 465.)

In summary and subject to the development of factual support for the assumption we have made concerning American's management and its use or possession of the subject real property, we believe that American's use or possession of such property meets the requirements of durability, exclusiveness, private benefit and independence to a degree sufficient to reasonably conclude that it has a taxable possessory interest.

Very truly yours,



Eric F. Eisenlauer
Senior Tax Counsel

EFE:ba

cc: Mr. John Hagerty - MIC:63
Mr. Verne Walton - MIC:64

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